STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 14, 2005
v	No. 251455 Oakland Circuit Court
ANDREW JAMES SCHWARTZ, Defendant-Appellant.	LC No. 02-183760-FH

Before: Whitbeck, C.J., and Zahra and Owens, JJ.

PER CURIAM.

Defendant was convicted by a jury of operating a vehicle while visibly impaired by intoxicating liquor ("OWI"), MCL 257.625(3), a misdemeanor, as a lesser included offense of the original charge of operating a vehicle while under the influence of intoxicating liquor ("OUIL"), MCL 257.625(1). Because defendant had been convicted of OWI twice within the previous ten years, his conviction was enhanced to a felony under MCL 257.625(11)(c). Defendant was sentenced to probation for three years, with 183 days to be served in jail. He appeals as of right. We affirm, but remand for correction of the judgment of sentence.

I. Admission of Breath Alcohol Test

Defendant first argues that the trial court erred in denying his motion to suppress the results of his chemical breath alcohol test. We disagree. A trial court's factual findings in a suppression hearing are reviewed for clear error. *People v Jenkins*, ___ Mich ___; ___ NW2d ___ (2005) (Docket No. 125141, decided February 1, 2005), slip op at 6. A factual finding is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made. *People v Bolduc*, 263 Mich App 430, 436; 688 NW2d 316 (2004). The trial court's ultimate decision on a motion to suppress is reviewed de novo. *Id.*

As an initial matter, we reject the prosecution's suggestion that the Supreme Court in *People v Wager*, 460 Mich 118; 594 NW2d 487 (1999), abolished any requirement that the prosecution establish the reliability of the test before admitting chemical test results. In *Wager*, the Supreme Court held that in order for a breath test to be admissible, there is no requirement that the test be administered within a reasonable time, as such a time requirement is not contained in the statute or in the administrative rules. *Id*. at 121, 125-126. However, contrary to the prosecution's argument, *Wager* does not hold that a relevant breath test is always admissible,

even if law enforcement's failure to follow the administrative rules in conducting the breath test caused the test to be unreliable. Since *Wager*, this Court has held that, to be admissible, chemical test results must be both relevant and reliable. *People v Fosnaugh*, 248 Mich App 444, 450; 639 NW2d 587 (2001). "[T]here is no bright-line rule of automatic suppression of evidence where an administrative rule has been violated." *People v Wujkowski*, 230 Mich App 181, 187; 583 NW2d 257 (1998). But suppression of test results is required when there is a deviation from the administrative rules that call into question the accuracy of the test. *Fosnaugh*, *supra* at 450.

In the present case, defendant argues that the trial court erred by admitting the breath test results because the testing officer's failure to follow the administrative rule requiring a pre-test observation period caused the test results to be unreliable. 2003 AACS, R 325.2655(1)(e) provides:

> A person may be administered a breath alcohol analysis on an evidential breath alcohol test instrument only after being observed for 15 minutes by the operator before collection of the breath sample, during which period the person shall not have smoked, regurgitated, or placed anything in his or her mouth, except for the mouthpiece associated with the performance of the test.

In *Wujkowski*, *supra* at 185-188, this Court held that where the defendant had been under observation for the required fifteen-minute period, except for six seconds during which the officer was checking the time, and there was no showing or allegation that the defendant placed anything in his mouth or regurgitated, the violation of Rule 325.2655(1)(e) was harmless and did not warrant suppression of the test results.

Here, the record indicates that defendant was in a holding cell before the test, with his hands cuffed behind his back. The observing officer testified that defendant was under observation for the required fifteen minutes. At most, the officer turned his head occasionally during the fifteen-minute period and would not always have been able to hear if defendant regurgitated. However, the officer's ability to observe defendant was not materially impaired at any time during the observation period. There is no evidence, or even allegation, that defendant regurgitated, put anything in his mouth, or was permitted to smoke. The trial court did not clearly err in finding that the officer would have been able to see defendant from where he was standing, and that the required fifteen-minute observation period took place. Defendant has failed to show that the breath test results were inaccurate. Therefore, the trial court did not err in denying defendant's motion to suppress.

II. Great Weight and Sufficiency of the Evidence

A. Great Weight of the Evidence

Defendant next argues that the jury's verdict was against the great weight of the evidence. Defendant did not preserve this issue by raising it in his motion for a new trial. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). Therefore, we review this issue for plain error affecting defendant's substantial rights. *Id*.

A trial court should grant a new trial based upon the great weight of the evidence only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice

would otherwise result. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). Defendant argues that his conviction was against the great weight of the evidence because the testimony of the officer who arrested defendant and conducted his breath test was not credible. "[A]bsent exceptional circumstances, issues of witness credibility are for the jury, and the trial court may not substitute its view of the credibility 'for the constitutionally guaranteed jury determination thereof.'" *Id.*, quoting *Sloan v Kramer-Orloff Co*, 371 Mich 403, 411; 124 NW2d 255 (1963).

> "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998). "[U]nless it can be said that directly contradictory testimony was so far impeached that it 'was deprived of all probative value or that the jury could not believe it,' or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination." *Id*. at 645-646 (citation omitted). [*Musser, supra* at 218-219.]

To convict defendant of OWI, the prosecution was required to prove that defendant's "'"ability to drive was so weakened or reduced by consumption of intoxicating liquor that defendant drove with less ability than would an ordinary, careful and prudent driver,"' and that the '"weakening or reduction of ability to drive [was] visible to an ordinary, observant person."'" *People v Fett (On Remand)*, 261 Mich App 638, 640; 684 NW2d 369 (2004), quoting *People v Calvin*, 216 Mich App 403, 407; 548 NW2d 720 (1996), quoting *People v Lambert*, 395 Mich 296, 305; 235 NW2d 338 (1975). At the time of this offense on February 22, 2002, a person with an alcohol content of more than .07 but less than 0.1 grams per 210 milliliters of breath was presumed to be impaired, while a person with a breath alcohol content of more than 0.1 was presumed to be under the influence of intoxicating liquor. MCL 257.625a(9)(b) and (c).

Here, the officer stopped defendant for speeding. Defendant failed to stop immediately when signaled to do so. Defendant smelled of intoxicants, his eyes were watery and bloodshot, his speech was somewhat slurred, and he could not produce his registration or proof of insurance. He admitted to the officer that in the preceding half hour, he had consumed two Long Island Iced Teas, which contained at least two shots of alcohol each. Defendant then incorrectly performed three field sobriety tests. Both of defendant's breath tests reported an alcohol level of 0.11 grams per 210 milliliters of breath, raising the presumption that defendant was under the influence of intoxicating liquor.

Defendant did not present any evidence that his driving was not impaired. Further, defendant has not shown that the officer's testimony was so far impeached that it was deprived of all probative value or that the jury could not believe it. The evidence does not establish a real concern that an innocent person was convicted or that defendant's conviction was a miscarriage of justice. Rather, the jury apparently dealt with the issues of weight and credibility raised by defense counsel by convicting defendant of the lesser offense of OWI, even though the breath test results were sufficient to support a conviction on the original charge of OUIL. Defendant has failed to show that the verdict was against the great weight of the evidence.

B. Sufficiency of the Evidence

Defendant also challenges the sufficiency of the evidence. In reviewing a claim that the evidence was insufficient, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002). All evidentiary conflicts must be resolved in favor of the prosecution. *People v Drohan*, 264 Mich App 77, 88; 689 NW2d 750 (2004). This Court will not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses. *Id.*

Viewed in a light most favorable to the prosecution, the evidence of the breath test results and the officer's testimony that defendant displayed signs consistent with being intoxicated was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant's ability to operate a motor vehicle was visibly impaired by the consumption of intoxicating liquor. Thus, the evidence was sufficient to support defendant's conviction for OWI.

III. Juror Misconduct

Lastly, defendant argues that the trial court erred in denying his motion for a new trial based on juror misconduct. Defendant argues that he is entitled to a new trial because the jurors considered extraneous factors in arriving at a verdict, and one juror did not understand that a hung jury would have been acceptable. We disagree. A trial court's decision on a motion for a new trial is reviewed for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). A new trial may be granted "on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." MCR 6.431(B).

A defendant tried by a jury has a right to a fair and impartial jury. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). During deliberations, the jury may consider only the evidence presented in open court, and may not consider extraneous facts not introduced into evidence. *Id*. In order to establish that the extrinsic influence was error requiring reversal, the defendant must prove that the jury was exposed to extraneous influences and that there was a real and substantial possibility that these influences could have affected the jury's verdict. *Id.* at 88-89. "Generally, jurors may not impeach their own verdict by subsequent affidavits showing misconduct in the jury room." *Id.* at 91. "[O]nce a jury has been polled and discharged, its members may not challenge mistakes or misconduct inherent in the verdict. Rather, oral testimony or affidavits may only be received on extraneous or outside errors, such as undue influence by outside parties." *Id.* "[T]he distinction between an external influence and inherent misconduct" depends on "whether the allegation is intrinsic to the jury's deliberative process or whether it is an outside or extraneous influence." *Id.* Thus, "[i]n examining these affidavits, a trial court should not investigate their subjective content, but limit its factual inquiry to determining the extent to which the jurors saw or discussed the extrinsic evidence." *Id.*

Here, defendant submitted the affidavit of a juror who indicated that he believed that defendant "was not guilty," and that he "changed [his] opinion because [he] was worried that [the jury] would be stuck deliberating indefinitely." According to the affidavit, "one juror suggested we compromise with impaired." The juror further averred that jurors considered that "drunk driving is dangerous to society" when suggesting the compromise verdict. The juror adds that had he known that a hung jury was acceptable, he would have maintained his decision that defendant was not guilty.

We conclude that the juror's affidavit addresses misconduct inherent in the verdict, i.e., whether the juror compromised his conscientiously held views for the sake of reaching a verdict. Further, although the juror averred that other jurors considered that drunk driving is dangerous to society, the juror did not aver that this information came from an extrinsic source. Rather, that consideration appears to be based on the jurors' own knowledge and experience and, therefore, was intrinsic to the jury's deliberative process. "[W]here the alleged misconduct relates to influences internal to the trial proceedings, courts may not invade the sanctity of the deliberative process." *People v Fletcher*, 260 Mich App 531, 539; 679 NW2d 127 (2004). Therefore, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

IV. Correction of Judgment of Sentence

As a final matter, the judgment of sentence erroneously indicates that defendant pleaded guilty to OUIL, third offense. Defendant was convicted by a jury of OWI, which was enhanced to a felony pursuant to MCL 257.625(11)(c) because defendant had been convicted of OWI twice within the previous ten years. We direct the trial court to correct this clerical error on remand.

Affirmed and remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Donald S. Owens